United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

20 Minutes

75-1050

To Be Argued By:
ALBERT J. BRACKLEY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1050

UNITED STATES OF AMERICA

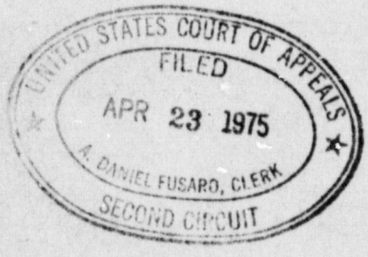
Appellee,

-against-

JOSEPH SCIANNAMEO,

Appellant.

BRIEF OF DEFENDANT-APPELLANT JOSEPH SCIANNAMEO



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HISTORY OF THE CASE

The Appellant JOSEPH SCIANNAMEO, appeals from a conviction after jury trial of crime of perjury in violation of 18 U.S. Code, Section 1623. He was sentenced on January 31, 1975, to a term of three (3) years, to be confined for a period of four (4) months and placed on probation for a term of thirty-six (36) months. This period of confinement was later reduced to three (3) months. (John R. Bartels, U.S.D.J.)

FACTS

On January 16, 1974, the Appellant was called before a United States Grand Jury sitting in the Eastern District of New York. Said Grand Jury was alleged to be conducting an

investigation of violations of Title 18 U.S. Code 892, extortionate extentions of credit.

The Appellant is alleged to have been a gambler and it was further alleged that the income from this alleged occupation was a financial source for any illegal extentions of credit.

He appeared and testified without immunity in response to a subpoena issued to him at a place of business called "Mary's Candy Store". Said store was owned by Mary Sciannameo, wife of the Appellant.

The testimony alleged to have been materially false, was stated as follows:

> "Question: Do you know what a runner is?
> Answer: That runs in the mile track?
> Question: In relation to the gambling business?
> Answer: I don't know the gambling business."

At the trial, the Government sought to prove that the defendant was a gambler and therefore, sought to infer that answers before the Grand Jury were materially false.

To accomplish this, the Government called two New York City Policemen, that testified to an arrest of the Appellant, who was alleged to have been in possession of gambling slips at the time of his arrest. (*State trial ended in a hung jury - re-trial is pending.)

The testimony was not complicated and the first

witness, Officer Thomas M. Doherty, testified that pursuant to a search warrant, he and fellow officers entered "Mary's Candy Store" on December 15, 1972. (Trial Record, Pg. 73,74) He stated the Appellant was found alone in the rear sitting at a table allegedly writing on some papers. On the table were papers alleged to be gambling records. (T.R., Pg. 75,76)

Cross-examination, insofar as, applicable to this appeal, sought to elicit various contradictions with respect to prior testimony and other matters relating to manner of arrest. However, it was also shown that although the Appellant wasalleged to be alone in a back room with alleged records, one Levy, was also arrested and charged with possession of same records. (T.R., Pg. 120) And further Levy was brought back to the store after the Appellant's arrest. (T.R., Pg. 120)

Thomas Hawkins was called, another N.Y.C. Policeman, who stated he was present at the arrest. On cross-examination he also stated one Levy was arrested and charged with same papers as Appellant. (T.R., Pg. 161)

At this point, the pertinent Grand Jury testimony of the Appellant was read to the jury and Government rested.

The Appellant did not offer any evidence.

POINT ONE

THE APPELLANT WAS DEPRIVED OF A FAIR TRIAL AS A RESULT OF THE TRIAL JUDGE'S APPARENT BAIS ON BEHALF OF THE GOVERNMENT'S POSITION.

The crux of the Government's case appeared to hinge on the Appellant's arrest, while in possession of gambling papers. They argued that if he had them in his possession, then, it would follow that when he stated that he did not know the "gambling business" he was stating a falsity.

The Appellant attempted to contend that since Levy was also arrested with same slips of papers, that the jury might infer that Levy was the gambler and not the Appellant. It appeared to be a simple matter of credibility.

However, the Trial Judge, interferred repeatedly on behalf of the Government and interjected Court's own comments, which it is respectfully submitted prejudiced Appellant.

An illustration of this point may be found at first on page 124 of the trial record.

As stated before, the Appellant attempted to show that police also arrested Levy and after the arrest brought him back to the store alone.

Since, it was alleged that both "old" work (T.R., Pg. 124) and "new" work was seized, the Appellant sought to

show on cross-examination that it was Levy who may have had possession of "old" and "new" work, when brought back to the store.

The Trial Judge appeared to ridicule this contention, as follows:

> Cross Examination by Mr. Brackley continuing:
>
> Q In any event, the material prior to December 15, does that have a terminology with respect to this gambling?
>
> A Yes.
>
> Q What is it called?
>
> A That would be called "old work".
>
> THE COURT: What does that mean?
>
> THE WITNESS: Something that is not current, not for that particular day.
>
> THE COURT: That is not an amazing description.
>
> Q Now, it is your testimony--what did you say that the person in Mary's would have to be, a controller or collector or what? What was that terminology?
>
> A A controller.
>
> Q And a controller in the terminology you use, has the old work laying right in front of him so you can walk in and seize it?
>
> A No sir. That would be pretty stupid--
>
> THE COURT: Now, he did not testify that way and you are arguing. He never said it was put on the desk so he could walk in and see it.

MR. BRACKLEY: Yes. I used that terminology. I did. I'm sorry.

THE COURT: If you want to argue you can argue.

Again, on page 126, the Court interjected its comments as follows:

Q Do you know any individuals that brought into that store, if it was brought into the store, any of the items you are testifying to now?

MS. KATZ: I object again, as irrelevant.

THE COURT: Well, I'll let him ask it.

A I don't know anybody.

Q And I take it the only direct connection--

THE COURT: After all, you are supposed to be cross examining this man on the direct examination.

MR. BRACKLEY: That's right, Judge.

THE COURT: Now you want to bring out something else which was not brought out on direct examination to wit, whether he knows of certain so-called runners who brought these slips into the store.

MR. BRACKLEY: No, only the specific slips seized on the 15th.

THE COURT: That is the same thing. That is what we are talking about.

Q In any event --

THE COURT: He never testified that he knew the runners or saw any runners.

MR. BRACKLEY: I believe he testified here that he does not know anybody.

THE COURT: He testified again and again that that wasn't -- an objection was made that it didn't make a difference whether he knew runners or not.
The question is, did the man know the gambling business. That's all.

At this point, it was sought to show that the officer had testified differently at a prior proceeding. (T.R., Pg. 128) However, the Trial Judge, again in the presence of the jury, compelled counsel to state that prior proceeding was a trial of the Appellant in the State Court. (T.R., Pg. 128,129)

Q Now sir, do you recall December 26, 1973, at a prior proceeding being asked these questions --

THE COURT: Wait a minute.
In what court?

MR. BRACKLEY: The Supreme Court, State of New York, county of Kings.

THE COURT: What is the title of the proceeding?

MR. BRACKLEY: It was a criminal case, Judge.

THE COURT: We have to know if it is a proceeding in which the man who is testifying, if it involves the defendant.

MR. BRACKLEY: Yes. People of the State of New York against Joseph Sciannameo.

THE COURT: Do you have objection to this?

MR. WEINTRAUB: I request a side bar to discuss it.

THE COURT: That's not an objection. It is a request. All right.

The Court finally permitted the attempt to impeach by use of prior testimony, but again interjected itself into matter to the prejudice of Appellant. (T.R., Pg. 132,133, 134,135,136) The Court during this part of testimony entered discussion on thirteen (13) occassions during four (4) pages of testimony. (T.R., Pg. 132,133,134,135)

The point the Appellant was trying to make was that the witness had testified that he was the Appellant actually write number 204. He has later changed that testimony, to state that he did not see him write said number 204. However, the Court placed its own interpretation on this vital point as follows:

Q Sir, as it developed you didn't even know whether he was writing on the top of the paper or bottom of the paper, is that correc?

A I know he was writing on the paper.

Q But knowing that you still went into a court, under oath and testified you saw him write number 204 for three dollar combinations?

A That's what I said.

Q And now you know that it is not what you actually saw, sir, isn't that correct?

THE COURT: Well, he doesn't know that either.

The Court further stated that there was nothing

"inconsistent" in this testimony. (T.R., Pg. 134)

Again, on page 137, the Court again cut into cross-examination with its opinion as to what facts were important to the Appellant. (T.R., Pg. 137-139)

> Q Do you know presently or as of January, 1974, where Mary's Stationery Store was located as of January, 1974?
>
> THE COURT: Wait a minute. I don't see the relevance of this. As I understand it, these papers were seized at Mary's Candy Store at 442 -- was it 432 Forth Avenue?
>
> MR. BRACKLEY: The Grand Jury --
>
> THE COURT: We don't care about the Grand Jury. I am not going to let confusion be introduced into this case.
> The question is, was he engaged in the gambling business. Did he know that at the time he was questioned before the Grand Jury.
> That's the question.
> I don't care where Mary's Candy Store was located at the time he was questioned. The real issue is, did he know anything about the gambling business.
>
> MR. BRACKLEY: I don't believe that is the real issue. It is an issue. But, the real issue is when questioning him, was it about this store or the present store.
>
> THE COURT: No, it is not so. They don't say "Did you know that gambling was going on at Mary's Candy Store on 6th or 7th Avenue."
>
> MR. BRACKLEY: Can we leave that as as question for the jury?

THE COURT: That might well be --

MR. BRACKLEY: I am just asking your Honor to let the jury determine that.

THE COURT: You have to look at what the indictment says and the questions and answers.
We will have to read all the testimony of this defendant and they'll decide whether or not he intended to and intentionally made a false statement.

MR. BRACKLEY: That's why we are here, Judge.

THE COURT: Well, the way you point it out, what you state is, whether this man ever went to the 397 Candy Store. He wasn't even in the Grand Jury when the question was asked.

MR. BRACKLEY: That's the point I am trying to make.

THE COURT: Well, it is an irrelevant one. I don't think that is relevant at all.

MR. BRACKLEY: I have to object.

THE COURT: Well, I have to rule.

MR. WEINTRAUB: If we discuss this, perhaps, outside the presence of the jury --

THE COURT: That is true.

MR. BRACKLEY: I am finished with the witness but I want to tell your Honor that the jury --

THE COURT: Don't tell me about the jury.
I said your questioning of him as to where Mary's CAndy Store was at the time he was brought to the Grand Jury is irrelevant.

I repeat that statement and I tell the jury that is irrelevant to the issues in this case as far as this man is concerned.
Did you ever go to the old/new candy store?

THE WITNESS: I don't believe so.

THE COURT: How far away from the old candy store is the new candy store? Does anybody know?

During the examination of witness Hawkins the Court again, beginning at page 160 (T.R.) joined the examination with comments and questions no fewer than twelve (12) times in five (5) pages of testimony. (T.R., Pg. 158,162)

The Court, interpreted this as follows:

THE COURT: Levy's got nothing to do with this case.

MR. BRACKLEY: I believe he does.

THE COURT: Proceed.

The summation by the Appellant's lawyer was also interrupted approximately fifty (50) times. (T.R., Pg. 186, 190,192,193,194,198,199,200,201,202,203,205,206,208,212,213,217)

And again, with respect to relevance of the testimony relating to Levy, the Court again offered it's opinion to the jury as follows:

MR. BRACKLEY: That's correct. That is simple.

THE COURT: Now, what happened to Mr. Levy at 432A Fourth Avenue is absolutely immaterial, isn't it?

MR. BRACKLEY: I don't think so, Judge, but if you rule --

THE COURT: I rule that it is.

MR. BRACKLEY: You can rule, all I can do is argue.
You know when they say it is not testimony and there is nobody testifying, Mr. Levy did this or nobody testified.

THE COURT: Now, I just ruled on that. You just keep Mr. Levy out of this case. I will tell the jury to ignore --

MR. BRACKLEY: Ignore Mr. --

THE COURT: Ignore Mr. Levy.

MR. BRACKLEY: He was part of the testimony.

THE COURT: I don't seem to make myself clear, I am sure, but I try very hard. Now, Mr. Brackley --

MR. BRACKLEY: Yes, Judge.

THE COURT: No more about Mr. Levy, understand?

MR. BRACKLEY: I have to accept, Judge.

It is contended herein, that the record disclosed that the conduct of the Trial Judge prejudiced Appellant's case in the eyes of the jury. The Judge herein exhibited an attitude of impatieance and annoyance. The comments as heretofore, discribed indicate the Judge made gratuitous comments disparaging the defense. (U.S. v. AH KEE ENG, 241 Fd. 2d 157, 2nd Circuit) It is felt that a trial judge should at all times be cautious in what he says and does in the presence of the jury, and remarks and conduct during trial should be impartial and not prejudicial to the accused.

It is obvious from reading the record herein, that

the Judge's conduct violated the Appellant's right to a fair trial. (U.S. v. MIELES, 481 Fd. 2d 960; U.S. v. SALAZON, 293 Fd. 2d 442, Rules of Criminal Procedure, Rule 52(b) (plain errors)

It was essential to the defense to show facts and circumstances of the arrest of Levy. The Court's actions inhibited this approach, indicated to the jury a bais on part of the Court herein.

POINT TWO

IT WAS ERROR FOR THE COURT TO QUESTION THE APPELLANT IN FRONT OF THE JURY.

The Appellant in this case did not testify. However, the Court in the presence of the jury called upon him to answer questions as follows:

> THE COURT: No, no. Let me get the truth here so I understand it at least then all of us can understand it.
> Give us a date Mr. Sciannameo, when Mary's Candy Store was moved. That is a simple solution. Do you know? You don't have to say anything --
>
> DEFENDANT SCIANNAMEO: It's about a year after the arrest, your Honor.
>
> THE COURT: That would be December 15, 1973 date.
> December 15, 1973, the candy store was moved.
>
> MR. BRACKLEY: Yes.
>
> THE COURT: January, 1974, the Grand Jury testimony was taken, right?
>
> MR. BRACKLEY: Yes, Judge.
>
> THE COURT: Now, the seizure, however, was December 15, 1972?

THE COURT: Now, the seizure, however, was December 15, 1972?

MR. BRACKLEY: Yes, Judge.

It was clear from prior discussion, prior to the selection of the jury that the Appellant would not testify. (T.R., Pg. 25-29)

It was plain error for the Trial Judge to question the Appellant in the presence of the jury. (Rule 52(b) F.R.C.P.)

CONCLUSION

THE CONVICTION HEREIN, SHOULD BE REVERSED DUE TO THE PREJUDICIAL CONDUCT OF THE TRIAL JUDGE AND A NEW TRIAL GRANTED.

Respectfully submitted,

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